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THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 11.

JUNIUS C. KLEIN, - - - - - Appellant,

vs.

BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY, - - - - - Appellee.

PETITION FOR REHEARING.

JOHN S. MILLIKEN,
JOHN P. HASWELL,
BLAKEY HELM,
EDMUND F. TRABUE,
JUNIUS C. KLEIN,
Counsel for Appellant.

WESTERFIELD-BONTE COMPANY, INCORPORATED, LOUISVILLE, KY.

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JUNIUS C. KLEIN, - - - - - *Appellant,*

vs.

BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY, - - - - - *Appellee.*

PETITION FOR REHEARING.

Comes now the above named Junius C. Klein, and presents this, his petition for rehearing of the above entitled cause, and, in support thereof, respectfully shows that on the 24th day of November A. D. 1930, this Court filed an opinion herein, and caused to be entered an order affirming the judgment of the State Court; that the opinion affirmed said judgment of the State Court upon two grounds, viz.:

(1) That the Act of 1924, Ky. Stats., §4088, did not deny to appellant the equal protection of the laws assured to him by the Fourteenth Amendment to the Federal Constitution; and

(2) That the assessment by the Tax Commissioners and officers of Kentucky did not deny to such appellant the equal protection of the laws in assessing his

shares of stock at 100% of value while assessing real estate in Kentucky at 69.9% in Jefferson County, and at 65% or 70% in other Counties in said State.

Notwithstanding the confidence we originally had in the first point, especially in view of the decision of this Court in *Louisville Gas & Electric Company* v. *Coleman,* 277 U. S. 32, we shall not ask of this Court a rediscussion of it, and its reconsideration of this question.

A study of the Court's opinion, however, on the second point, induces in us the belief that we failed to give to the Court the proper exposition of the effect of the Amendment of 1915 to Section 171 of the Constitution of Kentucky, classifying property for taxation.

As we shall show hereinafter, this Court may have been misled by the language of the State Court, 230 Ky. 186 (R. 58).

We recognize, as recited by this Court, that the Fourteenth Amendment does not forbid a State's classifying property as real and personal and making distinction between the rates of taxation on them respectively. This has always been the case, as we understand it (Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232).

The changes made in the State Constitution by the 1915 Amendment, we submit, no more authorize assessors to assess land at one percentage of real value and personalty at another, than did the section before amendment. That section was considered in the case of *Greene, &c.,* v. *Louisville & I. R. Co.,* 244 U. S. 499, and the Kentucky Constitution still requires all property

assessed at the same percentage of real value (fair cash value), as it did in the *Greene case* (244 U. S. 508).

Section 171 previously required levy of taxes to be "uniform *upon all property subject to taxation* within the territorial limits of the authority levying the tax;" and the section as amended in 1915 requires that "taxes shall be levied and collected for public purposes only and shall be *uniform upon all property of the same class* subject to taxation within the territorial limits of the authority levying the tax." Section 171 has always related solely to rate and never to assessment. So, the classification applies to rate, and not to assessment.

Neither the original section, nor the section as amended, authorizes assessment of property at different percentages of value, but on the contrary, Section 172 has always provided that "all property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any wilfull error in the performance of his duty, shall be deemed guilty of misfeasance and upon conviction thereof shall forfeit his office and be otherwise punished, as may be provided by law."

Section 174 has always provided:

> "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property."

It is demonstrated, therefore, that by Section 172 property must be assessed at fair cash value and that by Section 174 "all property * * * shall be taxed in proportion to its value."

By these sections the Commonwealth has a symmetrical and consistent system of taxation; but if taxing assessors could, instead of assessing property "in proportion to its value," or "at its fair cash value," determine at what percentage of value they would assess property, or under-assess property of such class or classes as they wished to select, it is obvious that the assessors would fix the rate of taxation upon different classes of property, and even change the rates prescribed by the Legislature.

For illustration, our Statute fixes 30c on the $100 as the rate on real estate, and 50c on other property; if then the assessors could assess real estate at 70% of value they could thereby reduce the rate on real estate to 21c (or 70% of 30c); or the assessors could assess personal property at 70% of real value and thereby reduce the rate on personalty from 50c to 35c (or 70% of 50c).

In as much, therefore, as the assessors reduced the rate on real estate by under-assessing it, these officers of the State denied appellant (owner of stock) the equal protection of the laws. This is established by the decision in the *Greene case,* and cases following it.

The principle for which we contend (established by the Greene case) is even more clearly affirmed in *Sioux City Bridge Co.* v. *Dakota County,* 260 U. S. 441.

The decision in the Greene case was followed by the Kentucky Court in *Eminence Dist. Co.* v. *Henry County Board,* 178 Ky. 811 (p. 823), January 25, 1918.

In the *Eminence case* the Kentucky Court based its decision as well upon the Fourteenth Amendment (p. 821) as upon the State Constitution, and quoted at length from this Court's opinion in the *Greene case* (p. 823).

This Court may have been misled by the language, doubtless inadvertently used by the State Court, in the *Klein case,* 230 U. S. 186, (Rec. 58), *viz.:*

> "Appellant cannot at least complain that property in a different class from his is assessed too low unless the inequality is gross, or such as to show an unreasonable discrimination."

The State Court concludes its exposition of the principle considered by saying:

> "The Court is unable to see, therefore, that appellant is entitled to any relief under the Constitution of the State."

What the Court said with reference to the State Constitution is immaterial to what this Court may decide under the Federal Constitution. Furthermore, the State Court referred solely to "land in Jefferson County," *while the findings of fact made by the Trial Court* (Rec. 47) show that appellant's case is not confined to assessment in Jefferson County, but extends to "the ratio, or average, of the assessments for taxation of real estate in all of the counties of the State of Ken-

tucky, for said year 1924, are between 65% and 70% of the fair cash values of same" (Rec. 47).

It results, too, from the Trial Court's *findings of fact* that the concluding sentence of the State Court's opinion, *viz.:*

> "Appellant cannot complain that land in Jefferson County is equalized at 70 per cent.; for land is equalized in each county by the County Board, because land values depend on local conditions; but intangible property is equalized by the State Board and is uniform throughout the State."

evidently overlooked the Trial Court's findings that assessments *"in all of the counties" were "between 65% and 70% of the fair cash values of same."* (Italics ours.)

The State Court cannot conclude this Court by the statement (230 Ky. 186—Rec. 58):

> "Appellant cannot at least complain that property in a different class from his property is assessed too low *unless the inequality is gross or such as to show an unreasonable discrimination."* (Italics ours.)

This Court will decide the question of unreasonableness for itself. In the *Greene case* (244 U. S. 499) this Court affirmed the judgment of the Circuit Court (Cochran, J.) where the percentage of assessed value was 40% below the fair cash value, and in the *instant* case the discrepancy is 30 or 35%. In the *Sioux City Bridge case* the assessed value was 45% less than the fair cash value, and this Court, as it did in the *Greene*

case, reduced the valuation, or assessment, of complainant's property to the reduced valuation of other property.

It is clear that the State Court cannot control this Court on the point just quoted from the State Court's opinion.

Nor can the State Court conclude this Court where the evidence forces a conclusion by this Court different from that reached by the State Court. This has been settled by repeated decisions of this Court since *Kansas City Southern Ry.* v. *Albers, &c., Co.,* 223 U. S. 573.

Our remedy, as appears from the *Greene case* and the *Sioux City Bridge case,* is to have the assessment of our property reduced to 65% or 70% of the valuation fixed by the assessors. The question is well settled by this Court in its opinion in the *Sioux City Bridge case,* 260 U. S. 446.

For the foregoing reasons it is respectfully urged that this petition for rehearing be granted, and that the judgment of the Court of Appeals of Kentucky be, upon further consideration, reversed.

JOHN S. MILLIKEN,
JOHN P. HASWELL,
BLAKEY HELM,
EDMUND F. TRABUE,
JUNIUS C. KLEIN,
Counsel for Appellant.

CERTIFICATE OF COUNSEL.

I, John S. Milliken, counsel for the above named appellant, do hereby certify that the foregoing petition for rehearing in this case is presented in good faith and not for delay.

JOHN S. MILLIKEN,
Counsel for Appellant.

APPENDIX.

Kentucky Constitution, Section 171:

"The general assembly shall provide by law an annual tax, which with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

"The general assembly shall have power to divide property into classes and to determine what class or classes of property shall be subject to local taxation. Bonds of the state and of counties, municipalities, taxing and school districts shall not be subject to taxation.

"Any law passed or enacted by the general assembly pursuant to the provisions of or under this amendment or amended section of the constitution, classifying property and providing a lower rate of taxation on personal property, tangible or intangible, than upon real estate, shall be subject to the referendum power of the people, which is hereby declared to exist to apply only to this section, or amended section. The referendum may be demanded by the people against one or more items, sections or parts of any act enacted pursuant to or under the power granted by this amendment, or amended section."

(Note: The residue of the section refers to procedure on referendum.)

Kentucky Constitution, Section 172:

"All property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any wilfull error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished, as may be provided by law."

Kentucky Constitution, Section 174:

"All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the general assembly from providing for taxation based on income, licenses or franchises."